

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

IN THE MATTER OF:

DENISE K. SCHOEN,
Appellant.

DOCKET NO. 97-07-126

**DECISION AND ORDER GRANTING
MOTION TO DISMISS**

BEFORE Katy K. Woo, Chair person; Robert Burns, Vice-Chairperson; and Dallas Green and John F. Schmutz, Esquire, Members, constituting a quorum of the Merit Employee Relations Board (hereinafter "Board" or "MERB") pursuant to 29 Del. C. § 5908(a).

AND NOW, this matter having come before the Board for oral argument upon the Agency's Motion to Dismiss for lack of jurisdiction on January 15, 1998, it appears to the Board that:

Denise K. Schoen, by letter from her counsel filed with the Board on July 8, 1997, appealed from what was characterized as her "apparent" termination from the State Treasurer's Office. Attached to the appeal were two letters from Frank A. Newton, Deputy State Treasurer, to Ms. Schoen.

In the first letter, Mr. Newton advised Ms. Schoen that her disability payment for the ninety (90) days provided for in the Delaware Code has been approved and that she is expected to return to work on April 1, 1997 and that the disability payment will cease with the pay period ending March 31, 1997.

The second letter, dated April 1, 1997, advises Ms. Schoen that she is being considered for termination of employment and advises her of her right to a pre-termination hearing. The stated grounds for the proposed termination are that Ms. Schoen had not responded to requests from the

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Agency for medical status information, progress of treatment information, and prognosis for recovery since such information was requested on February 6, 1997; that such failure to respond is regarded by Mr. Newton as a refusal to obey a lawful order; and the failure to respond and to provide any valid reason for not responding raises her action to a willful and wanton level of insubordination.

On April 15, 1997, Ms. Schoen by letter, among other things, requested that the proffered pre-termination hearing be conducted. By letter dated April 18, 1997, the State Treasurer, Janet C. Rzewnicki, sought to clarify a few points and advised Ms. Schoen that a verification of her employment status had been requested from the Pension Office and that any decision on whether to hold open Ms. Schoen's position would await that verification. In her letter, the State Treasurer stated that she had not agreed to have Ms. Schoen return to work on June 1, 1997 and would reserve decision until she had the clarification requested.

The Agency, through counsel, has filed a motion to dismiss this appeal on the grounds that Ms. Schoen was not a state employee at the time of the filing of the appeal (July 8, 1997) and that she was neither dismissed, demoted nor suspended for more than thirty days as required for a direct appeal to the Merit Employee Relations Board under 29 *Del. C.* § 5949(a). The Agency asserts, and Ms. Schoen does not contest, that on December 17, 1996, she applied for a disability pension from the State of Delaware and, on May 16, 1997, was advised that her application had been approved effective April 1, 1997.

Ms. Schoen filed her answer to the motion to dismiss, and the Agency subsequently responded to the answer by letter.

The Agency motion raises the issue of Ms. Schoen's ability to bring this appeal before the Board. This requires the Board to determine the effect of Ms. Schoen's successful application for a

Disability Pension in which she acknowledged that she understood that by applying for such pension, she would, upon the effective date of her Disability Pension, become permanently separated from her current position.

In order to pursue a direct appeal before the Board, Ms. Schoen must be an employee in classified service who has been dismissed, demoted, or suspended for a period in excess of thirty (30) days. 29 Del. C. §5949(a). The Merit Rules, in Chapter 200, define "employee" as any person legally holding a position in the classified service, and "grievance" as an employee complaint which remains unresolved after informal efforts at satisfaction have been attempted. The concept of a pensioner is more consistent with the idea of a former employee than an employee holding a position in classified service. Indeed, 29 Del. C. § 5502 provides that an individual shall not receive a disability pension for any month during which he or she is an employee.

Ms. Schoen was voluntarily "separated" (Merit Rule 14.0300) from state service on disability and, as of the date of oral argument, was collecting her disability pension. She is neither an employee nor was she dismissed from service. Effective April 1, 1997, under the uncontroverted facts, Ms. Schoen, by her own volition, became a pensioner and, thus, a former employee of the State of Delaware. She was not dismissed from her position nor was she an employee in classified service June of 1997 when she sought to file her grievance/appeal. This Board is, therefore, without jurisdiction to consider this matter.

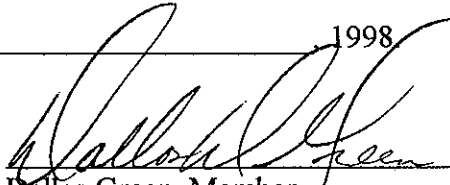
CONCLUSION OF LAW AND ORDER

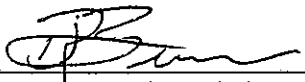
On the basis of the foregoing, the Board by the unanimous vote of Katy K. Woo, Chairperson; Robert Burns, Vice-Chairperson; and Dallas Green and John F. Schmutz, Esquire, Members,

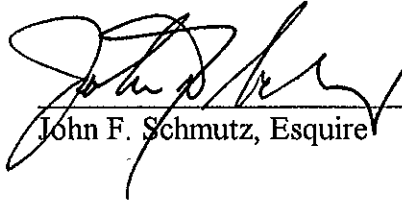
constituting a quorum of the Merit Employee Relations Board, concludes that it is without jurisdiction to hear and decide this matter. The Motion of the Office of the Treasurer is **GRANTED** and Docket No. 97-07-126 is hereby **DISMISSED**.

IT IS SO ORDERED this _____ day of _____, 1998


Katy K. Woo, Chairperson


Dallas Green, Member


Robert Burns, Vice-Chairperson


John F. Schmutz, Esquire

APPEAL RIGHTS

Pursuant to 29 Del. C. § 5949, the Grievant or the Agency may appeal to the Superior Court. The burden of proof of any such appeal to the Superior Court is on the appellant. All appeals to the Superior Court are to be filed within thirty (30) days of the notification of final action of the Board.

Mailing Date: 2/9/98

Distribution:

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Director's Representative

Merit Employee Relations Board

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

John F. Schmutz, Esq.

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